



1 THE COURT: Weiss versus National Westminster  
2 Bank, docket number 2005-CV-4622, consolidated with three  
3 other cases, Applebaum versus NatWest as well as Strauss  
4 versus Credit Lyonnais, docket number 2006-CV-702

5 Will counsel please state their names for the  
6 record?

7 MR. GLATTER: Good morning, Your Honor. Joshua  
8 Glatter, Osen LLC, on behalf of the Weiss and Strauss  
9 plaintiffs.

10 MR. OSEN: Good morning, Your Honor. Gary Osen,  
11 Osen LLC, on behalf of the Weiss and Strauss plaintiffs.

12 MR. BONNER: Good morning, Your Honor. Jim Bonner  
13 with (ui).

14 MR. FRIEDMAN: Good morning, Your Honor. Lawrence  
15 Friedman, Cleary, Gottlieb, Steen and Hamilton, on behalf of  
16 Credit Lyonnais.

17 MR. MOSKOWITZ: Good morning, Your Honor. Avram  
18 Moskowitz (ph), Cleary, Gottlieb, Steen and Hamilton, on  
19 behalf of Credit Lyonnais.

20 THE COURT: I'll let you propose what order we  
21 should discuss the issues on our agenda. I see we have the  
22 defendants' request regarding the scheduling and we have  
23 general scheduling issues to discuss in the Strauss and Wolf  
24 cases, and then also scheduling issues in Weiss. I owe you  
25 a decision on one of my favorite types of motions, the

1 motion for sanctions filed in the Applebaum case.

2 I have finished reading the deposition transcript  
3 and it ended up being far more effective as bedtime reading  
4 than I anticipated. We will be issuing a decision but in  
5 case any of you are dying to know, I'm going to deny the  
6 motion for sanctions. The transcript did not reflect what I  
7 would consider best practices in the conduct of depositions  
8 on both sides. But I would assume the filing of the motion  
9 has changed the practices in the taking of depositions.

10 Your Honor, in the Credit Lyonnais cases, we have  
11 three issues: To report to Your Honor the agreement that  
12 the parties reached last night; on scheduling for the next  
13 step in this case, and then to discuss the proposal that we  
14 have made for separating briefing on the Dalbert and summary  
15 judgment issues; and also our compulsion motion on the (ui)  
16 manuscript.

17 On the National Westminster Bank cases, I can  
18 report that the parties came to an agreement last night on a  
19 scheduling order, which I believe Mr. Schlanger has with  
20 him, for the onset and completion of expert discovery in  
21 those cases.

22 First with respect to the Credit Lyonnais cases,  
23 Your Honor, with respect to the schedule the parties have  
24 agreed to for the next step in this case -- these cases for  
25 Dalbert and summary judgment motion practice, it's the

1 exchange of contention interrogatories and the exchange of  
2 requests for admission related to the authenticity of  
3 documents.

4           And plaintiffs proposed to us a calendar for that  
5 last night, which is acceptable to us, and it provides for  
6 the exchange of contention interrogatories and requests for  
7 admissions related to the admissibility -- authenticity of  
8 documents. I apologize if I said admissibility before, I  
9 meant authenticity -- for the exchange to be on January 28<sup>th</sup>,  
10 2011. And plaintiffs have proposed, and it's acceptable to  
11 us, that the responses will be exchanged on April 11, 2011.  
12 That's a longer period of time than we had suggested but  
13 that's what plaintiffs proposed and it's acceptable to us.

14           THE COURT: Let me just get some sense, so that I  
15 can feel comfortable with the gap in time, of how many -- a  
16 guesstimate as to how many documents are going to be  
17 involved.

18           MR. FRIEDMAN: Well, plaintiffs also asked us last  
19 night if we had any suggestion for the number of contention  
20 interrogatories, and I suggested that we each be limited to  
21 25 contention interrogatories, including discrete subparts,  
22 in conformity with the rule.

23           As to the authenticity of documents, I think there  
24 are threshold issues on the authenticity of plaintiffs'  
25 documents that Your Honor is familiar with from the letters

1 that we submitted, and we'll see how we do. Again, this gap  
2 surprises me, especially in light of some of the protests  
3 about delay, which I'll come back to. But as I've said many  
4 times before, the plaintiffs' proposed calendar and the  
5 defendant calendar is acceptable to me. Even though I'd be  
6 willing to do something more quickly, I'll accept it, and  
7 the April 11<sup>th</sup> exchange date works for me.

8 THE COURT: I must have mis-heard. So it's April  
9 11<sup>th</sup> for --

10 MR. FRIEDMAN: Exchanges of responses to the --  
11 we'll do simultaneous --

12 THE COURT: Are you going to be -- will the  
13 defendant be providing a load of documents?

14 MR. FRIEDMAN: We'll be providing contention  
15 interrogatories.

16 THE COURT: Well, the contention interrogatories.  
17 That's --

18 MR. FRIEDMAN: And responses.

19 THE COURT: Yes, okay. So 4/11 is the response  
20 date for the contention interrogatories. But on the  
21 authenticity of documents, is there any need for such a long  
22 period of time?

23 MR. FRIEDMAN: It depends on how many documents  
24 are at issue. Under Magistrate Judge Matsumoto's -- one of  
25 her first orders in this case, plaintiffs were ordered to

1 produce to us all the documents they intend to rely on in  
2 these cases, and I presume that they have. They can tell  
3 us how many documents they anticipate seeking an  
4 authenticity stipulation on.

5 We already know from Mr. Naim's (ph) expert  
6 report, the retired police officer who is purporting to  
7 authenticate some documents, he has hundreds of documents  
8 from the Israeli police, court records and things of that  
9 nature that he is purporting to authenticate. And their  
10 expert reports have, I dare say, at least a thousand  
11 documents (ui).

12 I've not made a count of how many documents I will  
13 ask plaintiffs to authenticate but they've seen the lion's  
14 share already.

15 MR. GLATTER: Your Honor, the only thing I guess I  
16 would add is we did -- with respect to materials that may be  
17 submitted in connection with RFA's limited to authenticity,  
18 it may also encompass a universe of material beyond court  
19 records and banking documents, including certain videos.

20 There were certain materials, I believe, produced  
21 by the bank that in the course of depositions, we requested  
22 stipulations as to the documents satisfying the business  
23 records standards under both Rule 902 and 801. For many of  
24 the materials, the defendant did agree to that stipulation.  
25 There were certain materials that the defendant at that time

1 did not agree to, and it may be appropriate now.

2           We obviously have to go back and review the record  
3 and establish whether, through the course of the testimony,  
4 at this time, perhaps the defendant will agree that a  
5 sufficient foundation has been made and, accordingly, it is  
6 appropriate to admit to the authenticity of the documents.  
7 But it's a little bit hard for me to sit here today and tell  
8 you with precision exactly what the volume of those  
9 documents are or what the likelihood of that outcome will  
10 be.

11           But I only wanted to say that there is a universe  
12 of material beyond the items referenced in Mr. Naim's report  
13 that are likely to be appropriate subjects for us to propose  
14 RFA's on as to authenticity, which will hopefully streamline  
15 the process as we go forward.

16           MR. FRIEDMAN: I just want to correct something  
17 Mr. Glatter said. He said we tried to stipulate to the  
18 authenticity of bank documents. That's not true. We  
19 stipulated to the authenticity of everything produced from  
20 the bank. The requests for admission that we're talking  
21 about are limited to authenticity.

22           He is right that there are bank documents that are  
23 not business records that he asked us to agree are business  
24 records, but I'm happy to dismiss admissibility questions  
25 with him at any time.

1           THE COURT: The reason I ask is because I gather  
2 from Mr. Friedman's comment the large gap in time for the  
3 response was at your request. So if the bank isn't seeking  
4 a large number of RFA's as to documents produced by the  
5 plaintiffs, it may make sense to shorten the time and -- my  
6 suspicions are that you're going to have more documents that  
7 are the subject of your RFA's than the defendant will.

8           MR. GLATTER: That very well may be the case, Your  
9 Honor, and I would also add, and I think Mr. Friedman would  
10 agree with me, that when we discussed the service and  
11 response dates, most of the conversations really treated  
12 both potential interrogatories and the requests for  
13 admissions, you know, sort of as one block.

14           And much of what drives the proposed response date  
15 on our end does also turn upon the -- well, two things:  
16 certainly the response to contention interrogatories, which  
17 depending on what contention interrogatories the defendants  
18 serve on us and vice versa, may implicate a fairly broad  
19 range of materials.

20           And, secondly, I think that was also designed for  
21 both sets of discovery requests, to build in enough time  
22 that we would be able to meet and confer and advise the  
23 Court of any interim issues that might come up with respect  
24 to any motion practice that might be germane to those  
25 discovery areas, although again, we haven't specifically



1 discussed them.

2 MR. FRIEDMAN: Your Honor, as I said, the dates  
3 are ones that we agreed to. And as a defendant, I don't  
4 want to act like a plaintiff. But if that's the gap they  
5 want, that's the gap that I'll accept. I just don't want to  
6 hear accusations coming back that I'm seeking to foster  
7 delay.

8 MR. GLATTER: No such accusation is being made  
9 today, Your Honor.

10 MR. FRIEDMAN: Well, it was made yesterday.

11 THE COURT: I think you're anticipating the worst.  
12 Why don't we just shorten the time? You already have Mr.  
13 Friedman's agreement to a longer deadline, but let's just  
14 try to wrap this up. If you are -- I'm going to shorten the  
15 time a little bit and move it up. That also gets you out --  
16 gets this discovery completed, you know, well in advance of  
17 all the holidays that will be popping up in April.

18 MR. GLATTER: And this is with respect to the  
19 request for admissions, Your Honor?

20 THE COURT: Well, the response dates for -- for  
21 everything.

22 MR. GLATTER: For the requests for admissions as  
23 supposed to the contention interrogatories?

24 THE COURT: You want that long date for the  
25 contention interrogatories?

1 MR. GLATTER: We may. Obviously, it's difficult  
2 to --

3 THE COURT: Let's pick a shorter date and if it is  
4 totally unmanageable and you get two thousand documents and  
5 contention interrogatories with more subparts than you've  
6 contemplated, then we'll talk about it.

7 MR. FRIEDMAN: I would suggest, Your Honor, if it  
8 works for Mr. Glatter, that we cut it back by two weeks, to  
9 March 28<sup>th</sup>.

10 THE COURT: I think that's --

11 MR. GLATTER: I'm sorry, what date, Mr. Friedman?

12 MR. FRIEDMAN: March 28<sup>th</sup>.

13 MR. GLATTER: March 28<sup>th</sup>? That's acceptable, Your  
14 Honor.

15 MR. KNAPP: Your Honor, the next issue our  
16 proposal, which I presume Your Honor has read about.

17 THE COURT: It's very interesting.

18 MR. FRIEDMAN: Let me just say that Your Honor has  
19 read what I've written and I tried to write everything I  
20 have to say. But reflecting on it, let me just say, Your  
21 Honor, that plaintiffs made a strategic choice to put so  
22 many eggs in the experts basket. And on two of the three  
23 elements on which we intend to seek summary judgment,  
24 they're not presenting any fact witnesses at all, they're  
25 just presenting experts.

1           (ui) responsibility for the attacks, which is an  
2 element of the claim, and proximate causation, however you  
3 define it. Mr. (ui) and Mr. Coleman, who are proposing to  
4 get before the jury and say, we think Hamas committed these  
5 attacks. Your Honor knows why we think that's (ui). And  
6 they're proposing to put Mr. Spitzin (ph) and Dr. Levitt  
7 (ph) in front of the jury to say, we think Hamas controlled  
8 these entities (ui).

9           My point and my only point (ui) is they made a  
10 strategic decision to put their eggs on those two elements,  
11 as well as scienter, in the experts basket. Having made  
12 that strategic decision, they should not be heard to  
13 complain when we want to address the expert admissibility  
14 issues on a separate basis, because they will be in large  
15 part case dispositive.

16           I am frankly surprised at how plaintiffs have  
17 tried to prove those two elements. And if I may, Judge  
18 Sifton, at the very first status conference in this case,  
19 said to the plaintiffs in this very courthouse, how are you  
20 going to prove Hamas's responsibility for the attacks? And  
21 one of their co-counsel said, well, Hamas claims  
22 responsibility for these attacks. And Judge Sifton said,  
23 well, Hamas claims responsibility for a lot of things. Are  
24 you going to bring in people who are going to really talk  
25 about this? I think it was Professor (ui) said, yes, we're

1 going to bring in Israeli terrorist experts, we're going to  
2 have police, we're going to have this, we're going to have  
3 that.

4           They have none of that. They've put their eggs in  
5 the experts baskets. And bottom line, it would be more  
6 efficient for the parties and for the Court to have the  
7 expert admissibility issues resolved first. I will then be  
8 able to frame my briefs knowing what the universe of  
9 admissible evidence is. They can frame their opposition  
10 briefs and the Court can decide summary judgment, having  
11 first decided the universe of admissible evidence.

12           If we have to do them all at once, not only are we  
13 going to seek -- need to seek and to have enormous  
14 extensions of this Court's page limits for briefing, but it  
15 really will be nightmarish, to use Mr. Glatter's term in his  
16 letter of Tuesday, because we'll have to present (ui) to  
17 summary judgment under multiple scenarios of evidentiary  
18 admissibility, and we shouldn't have to do that.

19           Everybody agrees that the Court needs to decide  
20 admissibility before it decides summary judgment. So why  
21 not do it in sequence? It's not going to take a substantial  
22 additional amount of time, and we should do it in a way that  
23 will burden the Court the least and that will be more likely  
24 to result in a just adjudication of these lawsuits.

25           MR. GLATTER: Your Honor, in the spirit of how Mr.

1 Friedman commenced his remarks, I also will endeavor not to  
2 jut repeat that which has been set forth in my letter.  
3 That's something you've pointed out to me in the past. I  
4 just want to summarize three key points that explain why we  
5 believe that Mr. Friedman's proposed sequencing is not the  
6 appropriate sequencing for this case.

7 First, it's inefficient. The reason it's  
8 inefficient is because the very multiple evidentiary -- how  
9 did he phrase it -- the multiple scenarios of evidentiary  
10 admissibility will only become more confusing in a  
11 subsequent summary judgment stage, rather than evaluating it  
12 as a single whole in terms of the entire record of the case.

13 For example, there are multiple levels that have  
14 to be analyzed for any expert: Number one, whether or not  
15 the expert's methodology is reliable; number two, whether  
16 the evidence he's relying upon is or is not inadmissible in  
17 the first instance.

18 Our position would be, and we're not going to take  
19 Your Honor's time today to go through a preview of motion in  
20 limine practice, but much of the evidence that Mr. Friedman  
21 characterized in his letter as inadmissible will satisfy  
22 various hearsay exceptions and exemptions. And under I  
23 believe it's Rule 703 of the Federal Rules of Evidence, once  
24 that threshold determination is made, even assuming it's  
25 inadmissible, the test as to whether or not the expert can

1 introduce that ostensibly inadmissible material, rather than  
2 simply rely on it, is essentially a 401/403 test. Is it  
3 more probative than prejudicial? It's a different sort of  
4 test than were it to come in through a percipient fact  
5 witness.

6           And for that reason, we think -- that's why we  
7 cited Judge Sifton's Cohen (ph) case. We think it's likely  
8 that the Court can look at the record, look at much of the  
9 evidence that has been assessed at the deposition phase, in  
10 the documents themselves, and be able to determine, first,  
11 the summary judgment sufficiency test, as to whether or not  
12 there are material disputes as opposed to Dalbert's test of  
13 whether or not the expert is using reliable methods and  
14 satisfies its standard.

15           THE COURT: Well, I guess -- and I was actually  
16 going to interrupt Mr. Friedman on that, is that it's not  
17 clear to me, and you can confirm this, that even if the  
18 defendants were to prevail on every aspect of their Dalbert  
19 motion, that you still would be -- that you still would  
20 pursue this case, that you would have a response to any  
21 summary judgment motion.

22           MR. GLATTER: Your Honor, given that -- my  
23 response is that, if that hypothetical unfortunate scenario  
24 were to come, I don't agree, with all due respect, that it  
25 would be the case that we would be forced to abandon these

1 claims because it's a very nuanced analysis.

2           For example, the Court might conclude that certain  
3 of the experts' opinions are appropriate but not others.  
4 The Court might also conclude -- and it's an important point  
5 that we raised with Mr. Friedman sometime back with respect  
6 to several of our experts. It's very likely -- and I assume  
7 these matters would be resolved by Judge Trager -- that the  
8 Court might conclude that certain experts might be able to  
9 present particular evidence as a percipient fact witness,  
10 based on certain things that they personally know, but not  
11 necessarily be able to provide expert opinions on all  
12 matters. It's a very complex analysis.

13           THE COURT: I think that's apparent just from  
14 reading the defendants' synopsis of the expert reports, that  
15 a court could come to the conclusion that some parts of the  
16 experts' testimony would be admissible, even if they agreed  
17 with your analysis that the expert --

18           MR. FRIEDMAN: It could be. But to give my answer  
19 to Your Honor's question, would the plaintiff still have a  
20 case if we won on the Dalbert issues, obviously, it depends  
21 on which issues we win on and which we don't.

22           But let's focus first on proximate causation.  
23 They need to show -- and we can disagree about what the  
24 precise legal standard is, but they need to show that the  
25 monies that were transferred by Credit Lyonnais customer

1 CBSP somehow are proximately -- are causally related on a  
2 proximate basis to these attacks.

3 They have no evidence on that, except for what is  
4 presented by the two experts, Mr. Spitzin and Dr. Levitt.  
5 And they are not percipient witnesses.

6 THE COURT: Excuse me for interrupting, but I  
7 think ultimately, because of the intertwined nature of the  
8 two motions, it may be most effective to just file  
9 essentially this letter, which would be a pre-motion letter  
10 for a Dalbert hearing. And really, there's no evidentiary  
11 hearing here, I would think, because you've already deposed  
12 all of these experts, in conjunction with your pre-motion  
13 letters for summary judgment. That way, the Court will see  
14 it all laid out and figure out whether or not to stagger the  
15 motions.

16 MR. FRIEDMAN: And that goes to Judge Trager.

17 THE COURT: That would go to Judge Trager.

18 MR. FRIEDMAN: That's fine, Your Honor.

19 THE COURT: I tried to talk to him about it but we  
20 really -- I had to do some homework last night to just be  
21 able to talk to you today, reviewing the file, and he really  
22 has had less contact with this case than I have.

23 MR. FRIEDMAN: That's fine, Your Honor. I had  
24 raised it now because Your Honor had said a year ago that  
25 you wanted to ask us about that. So if I understand the



1 Court correctly, when we filed our pre-motion letter on  
2 summary judgment, which we still believe in the efficiency  
3 of staggered briefing, we will propose that to Judge Trager  
4 in our pre-motion letter.

5 THE COURT: Right. In hearing you -- both sides  
6 make their arguments today, I think probably staggering  
7 makes sense, but the staggering is not to determine the  
8 Dalbert motion first. It's to have you file your motion  
9 first, have the plaintiff's response, and then you can file  
10 your Dalbert motion. At least appellate courts seem to  
11 think that trial judges are able to sort out what's  
12 admissible and what isn't.

13 MR. FRIEDMAN: We will see how Judge Trager wishes  
14 to sort it out.

15 THE COURT: Right.

16 MR. FRIEDMAN: My objective, if you'll pardon the  
17 pun, is to avoid summary judgment briefs that are staggering  
18 in themselves, by having staggered procedures where the  
19 admissibility questions, the key admissibility questions  
20 could be decided first.

21 But I hear Your Honor. When we finish with the  
22 contention interrogatories and then we agree on a schedule  
23 thereafter, in our pre-motion letter to Judge Trager, again,  
24 if we still believe in the wisdom of this procedure, we will  
25 propose it. And who knows; by then we may be able to come

1 to some agreement as to how to most efficiently present this  
2 to Judge Trager.

3 THE COURT: Okay.

4 MR. GLATTER: That is fine with plaintiffs, Your  
5 Honor. Thank you.

6 MR. FRIEDMAN: The last issue we have is Mr.  
7 Shakhed's (ph) manuscript. Your Honor, as I noted in nmy  
8 letter Your Honor, and I hope that serves as the prod to  
9 plaintiffs that it was intended to be, we have four other  
10 letters with multiple document requests that were made of  
11 plaintiffs' experts at their depositions, including  
12 documents that we were previously told did not exist. But  
13 once we deposed witnesses, the witnesses confirmed they did  
14 exist.

15 I haven't gotten any responses to those. The one  
16 I did was with respect to Mr. Shakhed's manuscript. And Mr.  
17 Glatter told me he won't produce the manuscript and,  
18 frankly, Mr. Glatter asked me, did I have any authority for  
19 the production of a manuscript. I can't believe that's  
20 serious.

21 One of the credentials that Mr. Shakhed touts is  
22 that he writes books about Hamas. Well, he has a new book  
23 about Hamas, and I just can't imagine anyone seriously  
24 saying that that manuscript is not discoverable. It is  
25 discoverable. We're entitled to know what he's written for

1 publication that might be inconsistent with his opinions.

2           We've already found other articles and materials  
3 he's written, where he expresses opinions that are  
4 inconsistent with the opinions he expresses in this case.  
5 Maybe the manuscript will generate further evidence in that  
6 regard. I don't think they need any more time, I don't  
7 think I need to file a formal motion to compel, and I think  
8 they should produce it.

9           MR. GLATTER: Your Honor, just in brief response.  
10 One thing that's important to reiterate regarding that  
11 manuscript, which I may have mis-heard -- I didn't hear Mr.  
12 Friedman mention, is that it presently is an unpublished  
13 manuscript.

14           We actually spoke with the witness -- my  
15 colleagues have spoken with the witness. The manuscript is  
16 still in progress. He has not completed it yet and he  
17 apparently still has several chapters to write.

18           So whatever -- setting aside the fact that, as I  
19 mentioned in my letter, Mr. Shakhed's report did not reflect  
20 that he either considered or relied upon his manuscript in  
21 order to issue his opinions, and that is the standard for  
22 disclosure at least reflect in 26(a)(2)(b). So at best,  
23 what we're talking about here is (ui) Rule 26(c) discovery.

24           We believe that it is prejudicial at this time to  
25 force him to turn over something that's an unpublished,

1 private work in progress, which is not and has not been  
2 testified (ui), on the sole ground of, essentially, we need  
3 to probe it for consistency and bias. And therefore, we ask  
4 Your Honor that this is not the appropriate time to have  
5 that produced, absent a stronger showing by the defendant.  
6 They've had a full and fair opportunity to probe the bases  
7 and the -- not only what he's relied upon but what he's  
8 considered and perhaps not relied upon. And they've had a  
9 full, seven-hour deposition with him.

10 He has published books on Hamas in the past. If a  
11 later time comes and they believe it's appropriate after the  
12 book is published, they will be able to obtain it and talk  
13 to us at that time, if they think that there's some further  
14 discovery they need when we put our final Rule 26(a)(3)  
15 trial witness list together, then we can discuss it at that  
16 time. But it's premature now, Your Honor, and that's how we  
17 see it.

18 MR. FRIEDMAN: May I respond briefly?

19 THE COURT: Go ahead.

20 MR. FRIEDMAN: Just because an expert chooses not  
21 to rely on something doesn't inoculate prior -- Your Honor,  
22 I asked him on page 58 of his deposition transcript:

23 "Question: Do you have a manuscript prepared of  
24 that book?

25 "Answer: Most of the chapters, yes.

1           "Question: Does the book address what  
2 organization was responsible for particular attacks?

3           "Answer: We're talking about Hamas. It's  
4 ideology, changes of ideology. We're talking about the  
5 terrorist activity of Hamas vis a vis their ideology.

6           "Question: So the book does not address the  
7 question of whether or not Hamas was not responsible for a  
8 particular attack?

9           "Answer: I'm mentioning what Hamas did.

10          "Question: Do you address in the book the  
11 question of whether or not Hamas was responsible for a  
12 particular attack?"

13          Mr. Glatter objected to the form.

14          "Answer: Yes."

15          Whether he has five chapters done, ten chapters  
16 done or 27 chapters done, the man has written something for  
17 publication. I'm entitled to get a copy of it.

18          MR. GLATTER: Your Honor, again, I don't want to  
19 belabor the point. If and when the book is published, if  
20 Mr. Friedman and his colleagues believe that there is  
21 material in that book that permits them to cross-examine and  
22 impeach Mr. Shakhed and matrix it against his report and his  
23 deposition testimony, they will have an ability to do that.  
24 It's an incomplete, unpublished manuscript. It's not  
25 something that he relied upon in issuing his opinions, it's

1 not something that he considered in issuing his opinions  
2 because if he had, it would have had to have been listed  
3 within his report.

4 MR. FRIEDMAN: I left something out, Your Honor,  
5 I'm sorry, just two questions and answers.

6 "Question: You have this manuscript on your  
7 computer?

8 "Answer: But I'm not going to give it.

9 "Question: We'll see.

10 "Answer: I hope you will buy the book."

11 We shouldn't have to wait until it's published.  
12 If it exists, it exists, and I'm entitled to see it.

13 MR. GLATTER: Your Honor, under that standard, let  
14 me give a (ui) contrast, for example. One of the expert  
15 witnesses that the defendant proposed as a rebuttal expert  
16 is a gentleman by the name of John Barton (ph), who is a  
17 partner I believe with Arnold and Porter, right?

18 MR. FRIEDMAN: Yes.

19 MR. GLATTER: Who offered certain opinions  
20 regarding OFACT (ph) regulations. He has published a series  
21 of articles and bulletins and client bulletins. Under the  
22 standard that Mr. Friedman is elucidating today, in theory,  
23 I should be entitled to know every bit of advice he's ever  
24 given a client with respect to the OFACT regulations to  
25 matrix whether it's consistent with the opinions he offers

1 in his report. I should be able to obtain drafts of --

2 THE COURT: Mr. Glatte, you know that there are  
3 other considerations there.

4 MR. GLATTE: Of course, Judge.

5 MR. OSEN: Your Honor, if I may, just one point.  
6 I don't want to belabor this more than we already have, but  
7 since Mr. Friedman is quoting the transcript, on page 59 of  
8 the transcript, he asks:

9 "Does it address any of the attacks that are at  
10 issue in your report?"

11 And the answer the witness gave was, "No, because  
12 I put all my emphasis on 1996, the two buses, number 18 and  
13 then 1978 (ui), and then I'm going to other thing, not the  
14 special operations of Hamas."

15 MR. GLATTE: Then proceeded to explain what  
16 special operations meant.

17 MR. FRIEDMAN: The reason it's still important is  
18 the following: And if you want me to get into this in front  
19 of Her Honor, I will.

20 In his report, among one of Mr. Shakhed's more  
21 fantastic statements was, Hamas has never claimed credit for  
22 an attack it did not commit. At his deposition, I showed  
23 him a book he published in 1994. I think it was 1994, maybe  
24 2004, in which he goes through in great length Hamas's  
25 claims of responsibility at the highest levels of Hamas for

1 having committed a terrorist attack -- terrorist act. In  
2 that instance, it was the kidnaping of an Israeli officer.

3 So the man said in his report in this case, Hamas  
4 has never claimed credit for something that it didn't do,  
5 which I'm sure the plaintiffs are going to rely on to say  
6 that Hamas's claims of responsibility, although hearsay,  
7 nonetheless should be admissible because they're reliable.

8 We've already showed that in one of this man's  
9 other books, he completely contradicted that broad  
10 declaration. I anticipate that I will find similar  
11 contradictions in his new book, and whether they concern the  
12 attacks at issue here or not doesn't matter.

13 Finally, the man has in his c.v. as one of the  
14 reasons why he is an expert in the field he purports to talk  
15 about the fact that he's published two books. He now has a  
16 third one. We should see it.

17 THE COURT: Tell me, if you find the draft to be a  
18 trove of information, are you going to depose him further  
19 and use that as further ammunition in any potential Dalbert  
20 motion, or are you just simply going to use the information  
21 to challenge his credibility?

22 MR. FRIEDMAN: I don't know what it says so I  
23 can't say, Your Honor. But the notion that the moment of  
24 publication is somehow magical and someone can be impeached  
25 only as of the date of publication but not before then is



1 preposterous. The man said he has this manuscript, it's  
2 going to be published, he identified the publisher. The  
3 notion that I should have to wait until the publisher  
4 decides to release the book -- it's his writing. Either it  
5 is or it isn't. And if he wants to say, well, yes, that's  
6 in my draft but I was planning to take it out before it was  
7 published, he can say that.

8 But to me, it's just beyond question. The man has  
9 written something for publication. He's purporting to  
10 express opinions in the same field. I'm as entitled to see  
11 it as I am entitled to see something that has been  
12 published. No one would doubt it. I doubt Mr. Glatter  
13 would question it. Of course, I'm entitled to see something  
14 that a witness has published. Well, if there's something  
15 that he's written and it's on the eve of publication, it's  
16 poised for publication, I'm entitled to see it as well.

17 Plus, we have a protective order. I can assure  
18 Mr. Shakhed and I can assure Mr. Glatter that I'm not going  
19 to ruin the market for his book. I am not Julian Assange,  
20 I'm not going to put it on the internet. I'm not going to  
21 somehow adversely impact his ability to sell this book. We  
22 can mark it under the protective order and I will not  
23 disclose it to anyone, not even to my client. But I'm  
24 entitled to see it.

25 MR. GLATTER: Your Honor, just two points in

1 response and then my colleague, Mr. Osen, may have some  
2 collateral points on this.

3 First, Mr. Shakhed's testimony made it quite clear  
4 that when he referred to Hamas claiming credit, he was  
5 talking about a particular type and category of claim.

6 Secondly, to reiterate, we're talking about an  
7 unpublished manuscript that has not been completed, that  
8 there are still chapters to write. Mr. Shakhed has not  
9 proffered his qualifications to testify in this case because  
10 he has a book that will soon come out on the matter. He  
11 pointed out two books that he already has published, and  
12 those have been disclosed.

13 He didn't say, nor should any expert to my  
14 knowledge say, at some point, a publisher may agree to  
15 publish the manuscript that we're still working through.  
16 And, therefore, on that basis, I am qualified to testify as  
17 an expert under the Federal Rules of Evidence. That would  
18 be a little strange.

19 And, again, recognizing also that Mr. Shakhed is  
20 obviously not my client, there are privacy concerns here. I  
21 should add, Mr. Friedman did, when we had the discussion,  
22 represent to me that they would keep it as a confidential  
23 matter, and that's not a surprise and we appreciate that.  
24 But it doesn't fully resolve the problem here.

25 And, again, if Mr. Shakhed was relying upon or

1 considering his unfinished work for his -- for these present  
2 attacks, that would have been something to be disclosed  
3 (ui).

4 MR. FRIEDMAN: Mr. Glatter said something that  
5 implicates another part of the deposition, so I'll just tell  
6 Your Honor.

7 "Question: Have you written a third book?

8 "Answer: I'm in the process of finishing it.

9 "Question: You're now in the process of finishing  
10 it?

11 "Answer: It will be on press in a few months.  
12 But the last year, I didn't work on it, and I have to renew  
13 my work now."

14 Again, the expert does not make the decision as to  
15 what he can be impeached with and what he can't be impeached  
16 with by putting it on his c.v. or not. If his credentials  
17 are -- in fact, in Mr. Glatter's letter to Your Honor on  
18 Tuesday night, Mr. Glatter said, how can they say that Mr.  
19 Shakhed is just a newspaper reporter; he's written a learned  
20 treatise on Hamas. Well, he's written a second learned  
21 treatise on Hamas.

22 THE COURT: I've heard enough.

23 MR. OSEN: Your Honor, can I just add one thing  
24 because it's practical. I'm not getting into the (ui) of  
25 this.

1           Mr. Shakhed, it's not really a secret, is also  
2 going to be designated in the NatWest case as well. He will  
3 submit a report in that case as well. So from simply a  
4 practical standpoint, he will presumably be deposed in some  
5 fashion in that case as well. And at that point, his  
6 manuscript may very well be at least, if not published,  
7 final, to the point where, even if it hasn't come off the  
8 presses, there may be a final version that doesn't reflect  
9 drafts or changes or iterations he may make, but will in  
10 fact be the unpublished, final manuscript.

11           At that point, you know, from my standpoint, I'd  
12 like him to turn it over, just as I'd like his book to have  
13 already been published, since it adds one more credential  
14 and so on. It seems to me that that's really the time at  
15 which to worry about it.

16           THE COURT: I think if we had another year of  
17 discovery, I would agree with the plaintiffs, but we're  
18 finishing up discovery. I will require the draft to be  
19 turned over. It will be subject to attorney's eyes only and  
20 it may or may not be useful.

21           But to the extent that there are any -- there is  
22 any information there that you think would be relevant to  
23 your Dalbert motion, then you can have a further deposition.  
24 But otherwise, you will await the final publication, and I'm  
25 going to require the defendant to buy a copy of his book --

1 MR. FRIEDMAN: Thank you, Your Honor.

2 THE COURT: -- when it is published.

3 MR. FRIEDMAN: So I presume the plaintiffs will  
4 give that over to us promptly, and they can mark it highly  
5 confidential under our protective order.

6 The last item we have, Your Honor, is the only  
7 item we --

8 THE COURT: Wait.

9 MR. GLATTER: I'm sorry, just on this point. It's  
10 a housekeeping matter but it's relevant to an upcoming  
11 deposition. We understand your order and we will  
12 communicate with Mr. Shakhed immediately and arrange for  
13 production.

14 THE COURT: And then, obviously, if there is  
15 questioning about the draft, that part will be sealed until  
16 publication of the book.

17 MR. GLATTER: That's understood and appreciated,  
18 Your Honor.

19 The question that I have is -- and it actually may  
20 be germane to another discovery issue that came up in Mr.  
21 Coleman's deposition. You asked Mr. Friedman quite  
22 logically whether or not he intended to seek to re-depose  
23 Mr. Shakhed on -- once the manuscript is produced. And  
24 understandably, Mr. Friedman said that he's not certain yet  
25 because he hasn't had a chance to review it.

1           Next Thursday, we are scheduled to depose (ui)  
2     Jenkins (ph). He is a rebuttal expert that the defendants  
3     have designated, who is seeking to rebut the opinions of  
4     four of plaintiffs' experts; specifically, Mr. Shakhed, Mr.  
5     Coleman, Mr. Spitzin and Mr. Levitt. All four of them are  
6     what we have described as attribution experts.

7           On the same score, during Mr. Coleman's deposition  
8     -- and we haven't set this up -- we haven't advised Your  
9     Honor of this yet but I'll let you know now. There were two  
10    requests that were placed to us at that deposition, which at  
11    the deposition, we had not been able to agree to. One of  
12    them was a request for work that Mr. Coleman did for my firm  
13    in a consultant capacity, in what I represented was an  
14    unrelated matter involving (ui) litigation.

15           And the other item was a request that is a little  
16    bit complicated and Mr. (ui) can I'm sure help fill in the  
17    details of it, but a request that Mr. Coleman turn over his  
18    -- a physical copy of his entire proprietary database,  
19    rather than what we have turned over, which is voluminous  
20    but is a narrow set of materials that he in fact looked at  
21    and relied upon in issuing his opinion concerning the  
22    authenticity and credibility of certain statements made by  
23    Hamas.

24           I am very reticent to -- and I had some  
25    discussions with defense counsel on this score -- to proceed

1 to depose a rebuttal expert going to two of my experts,  
2 without knowing whether or not they do intend to reopen, for  
3 example, Mr. Shakhed's deposition upon review of that  
4 material, question him further.

5 And then at least I am in a position, from an  
6 efficiency standpoint, to know the entirety of my witnesses'  
7 testimony before I examine Mr. Jenkins. And I think that's  
8 fair and that's fairly standard. Naturally -- and I should  
9 add that Mr. Luft (ph) and I, for reasons unrelated to the  
10 discovery request, did have some discussions generally as to  
11 whether or not Mr. Jenkins's deposition could be postponed  
12 past the 16<sup>th</sup>, until about the third week of January. He  
13 advised me that at that time, Mr. Jenkins's schedule didn't  
14 permit it, and we continued to keep it calendared for next  
15 week.

16 But it's almost inevitable that until we have  
17 resolution of any further discovery and depositions that  
18 we're going to be taking from our people, that I can't  
19 imagine a scenario where it would be likely that we wouldn't  
20 then want to reopen the deposition for a rebuttal expert  
21 going directly to those opinions, including the specific  
22 reasons why Mr. Friedman is very interested in seeing Mr.  
23 Shakhed's manuscript.

24 So from a logistics standpoint, I think that it  
25 would be appropriate, if it's going to be produced, that we

1 have some indication as to whether or not he is going to  
2 seek to re-depose Mr. Shakhed. It may be -- for example, if  
3 Mr. Shakhed is going to be re-deposed on issues that weren't  
4 covered already in the Credit Lyonnais case, one simple  
5 avenue might be to then depose Mr. Jenkins after Mr.  
6 Shakhed's testimony has been captured in both cases. And  
7 Mr. Jenkins, to the extent he feels he needs to issue a  
8 supplemental report based on the additional material or the  
9 additional testimony that may be elicited, I have no  
10 objection to that.

11 Frankly, I think it would be a lot more efficient,  
12 and I'll have the whole universe of information in front of  
13 me, frankly in both cases, for us to be able to respond to  
14 that. As a matter of fact, with respect to the Coleman  
15 issue, Mr. Coleman's report is actually captioned in both  
16 cases.

17 So I hope Your Honor understands, and I apologize  
18 for the lengthy narrative, the logistics concern we have,  
19 and perhaps we can address that today, so that it's  
20 equitable for all the parties.

21 MR. FRIEDMAN: Your Honor, I'll let Mr. Luft fill  
22 in the details about this logistics issue, but let me just  
23 point out exactly what is going on here.

24 They failed to produce documents that they should  
25 have produced. Your Honor instructs them to produce the



1 documents. And now they say, well, because we haven't  
2 produced them yet and because you haven't seen them yet, and  
3 because you may want to re-depose the author, we don't want  
4 to take a deposition of the rebuttal witness next week.

5 That is the person who doesn't act properly and  
6 fails to produce a document that they should have produced  
7 trying to take advantage of it, frankly for a reason I don't  
8 understand. Mr. Glatter has been asking us for a week now,  
9 can we put off Mr. Jenkins next week, can we put off Mr.  
10 Jenkins next week? Now I'm going to act like a plaintiff,  
11 even though I'm a defendant.

12 Mr. Jenkins's deposition has been put off several  
13 times. Mr. Jenkins works in California. Plans are in place  
14 for Mr. Jenkins to come here and to be deposed next week.  
15 Mr. Glatter keeps asking us, can't we put this off, can't we  
16 put this off, and I don't understand why.

17 And now to say because Her Honor has said you can  
18 see another document from Mr. Shakhed, and I don't know  
19 whether you want to re-depose Shakhed again, although I  
20 think Your Honor said we will question Shakhed again in the  
21 NatWest case.

22 THE COURT: Right.

23 MR. FRIEDMAN: And although we learned --

24 THE COURT: There will be no deposition of Shakhed  
25 in this case unless it is purely to assist the defendants in

1 presenting their Dalbert motion.

2 MR. FRIEDMAN: That's what I understood Your Honor  
3 to say. And now with Coleman, Mr. Luft deposed Mr. Coleman  
4 last week, and we learned that he did consult parts of his  
5 database that we previously got in a letter from Mr.  
6 Glatter's colleague, saying that he did not consult. So we  
7 said now we're entitled to see the database.

8 Mr. Glatter -- Your Honor, in the middle of the  
9 deposition, Mr. Glatter said, well, it looks like we've got  
10 to produce the database, maybe we should continue the  
11 deposition and you shouldn't finish. And we said no, he's  
12 here, we want to finish the deposition.

13 So they didn't produce the database, they  
14 represented to us falsely that the full database was not  
15 consulted. Now it's clear, although we haven't raised this  
16 before Your Honor yet in writing, as we'd like to, that we  
17 are entitled to the full database, and the party that is in  
18 the wrong for failing to produce the document now says,  
19 well, if you're going to get the database, then maybe you're  
20 going to get to depose my guy again after you look at it.  
21 And, therefore, I shouldn't need to depose your guy next  
22 week.

23 That's just wrong and it's also totally improper,  
24 in light of the fact that Mr. Jenkins's deposition has been  
25 adjourned repeatedly, there are arrangements in place for

1 him to be deposed next week. He is one of the world's  
2 leading counter-terrorism experts. He travels the world as  
3 you and I commute between Brooklyn and New York, and this is  
4 just wrong. This is just wrong.

5 MR. GLATTER: May I respond? First, I should --

6 THE COURT: Let me just sort out in my mind what  
7 it is that you're concerned about. One is the premature  
8 deposition of Jenkins because he might rely on information  
9 yielded in any continued deposition of Shakhed?

10 MR. FRIEDMAN: Their view is that we may want to  
11 depose Coleman again.

12 THE COURT: Okay. I just want to sort out exactly  
13 what it is Mr. Glatter is asking for. Are you asking for a  
14 delay in the deposition of Mr. Jenkins in part because of a  
15 concern that if there is a continued deposition of Shakhed  
16 based on whatever may excite the defendant over the  
17 manuscript produced, that Jenkins may change his opinion and  
18 want to -- so that you don't want to depose him on any  
19 additional information regarding Shakhed that may influence  
20 his opinion?

21 MR. GLATTER: Your Honor, among other things, I  
22 would want to know the entirety of the information that Mr.  
23 Jenkins has considered for review before he is deposed. And  
24 given that he is -- whether it's Shakhed or any other  
25 expert, that the defendants have put in discovery requests

1 which presumably they would ask their rebuttal expert to  
2 evaluate, I'm entitled to know exactly what information is  
3 elicited from my expert in that case before I go in to  
4 question their rebuttal expert.

5 I should add, by the way, with respect to my most  
6 recent request to adjourn Mr. Jenkins's deposition from next  
7 Thursday to anytime between December 23<sup>rd</sup> and the 30<sup>th</sup> of  
8 January, it's a fairly innocuous reason. I explained that  
9 my colleague, Mr. Osen, actually had to do some business  
10 travel overseas that week, and if he could be accommodated,  
11 that would be appreciated. If not, then we would keep the  
12 calendar as is.

13 I did not know how Your Honor was going to rule  
14 with respect to Mr. Shakhed's manuscript, and you were  
15 pointing out to Mr. Friedman the question as to whether he  
16 will -- Mr. Shakhed will be re-deposed for any purpose,  
17 whether it's limited to an assessment of Mr. Shakhed's  
18 appropriateness under Dalbert standards or whether it's  
19 testimony that might be elicited at trial, it's important  
20 for me to know the entirety of that testimony before I am  
21 deposing a gentleman who has been designed to rebut that  
22 very witness.

23 With respect to Mr. Coleman, what I should point  
24 out quite specifically -- there's a lot of nuance, but  
25 during the course of Mr. Coleman's deposition, early on in

1 the first day -- it was broken. We were given a two-day  
2 period for nine hours to accommodate certain requests the  
3 defendants had based on what we would describe as a sub-  
4 database that had been produced to them, which constituted  
5 the universe of material that Mr. Coleman looked at.

6 And upon his testifying that subsequent to reading  
7 Mr. Jenkins's report, he reviewed and looked at some  
8 additional materials, which he had not looked at at the time  
9 he signed his report, during a break, I spoke with defense  
10 counsel and I said, look, we're prepared to produce those  
11 additional materials to you, the ones you didn't have  
12 because he didn't know he'd be looking at them until he saw  
13 the rebuttal report.

14 And in light of that, I made a recommendation that  
15 we adjourn the deposition, that we make at least that  
16 additional production of what he in fact looked at, and that  
17 they could then continue it at a time that we would agree  
18 upon, and then we would also meet with him for -- to come up  
19 with a new and mutually acceptable date for Mr. Jenkins's  
20 deposition. That seemed to be in everyone's interest. The  
21 defendant declined that recommendation and that's what it  
22 was entitled to do.

23 The defendants' larger request has been for Mr.  
24 Coleman to produce a physical copy of his entire proprietary  
25 database, which his testimony indicates includes very

1 sensitive information concerning on-line passwords that he  
2 has, anonymous names he uses, often for work that has  
3 nothing to do with this case but for consultancy work he  
4 does, often for the United States government, military  
5 commissions, et cetera.

6           We have tried to explore, and in fact made  
7 representations to defense counsel, some ways of  
8 accommodating their interest in knowing what the abstract  
9 universe of material is in that database, without actually  
10 turning a physical copy over. Because it's -- the best  
11 analogy I can come up with, Your Honor, is West Law. Mr.  
12 Coleman has a very large database with a lot of material.  
13 He runs searches and he comes back with hits, and he looks  
14 at what the hits are. So just as you and I might run a  
15 search on say all feds --

16           THE COURT: I understand your point.

17           MR. GLATTER: Therefore, we explored, for example,  
18 again with the suggestion that perhaps the deposition be  
19 postponed, so they had clarity and had transparency, once  
20 the testimony made some things clearer, that we for example  
21 come up with a way for them to propose searches they would  
22 like the witness to run, to personally observe, and then  
23 once they've done that, they could continue the deposition.

24           At that time, they declined that suggestion. I  
25 suggested other -- that they could come to us with any

1 alternatives with respect to -- short of turning over a  
2 physical copy of two terrabites of data, much of which he  
3 did not look at and has not looked at for this case, and to  
4 date, we haven't been able to come up with any understanding  
5 there.

6 But because that issue looms out there and because  
7 these are two very important witnesses with respect to the  
8 plaintiffs' case, as highlighted by the very fact of the  
9 sequencing that Mr. Friedman requested, that brought us  
10 before Your Honor today on that ground, again, it's a  
11 housekeeping matter but an important one that we'd like to  
12 get some guidance from Your Honor on.

13 My view of it is that we should run those issues  
14 down with our experts. To the extent that the scheduling  
15 logistics can be accommodated for the NatWest schedule as  
16 well, where as Mr. Osen pointed out, these experts either  
17 have (ui) reports in both cases or will shortly be producing  
18 additional reports, that seems to be one vehicle of handling  
19 it. There may be other ones.

20 But I suggest to Your Honor that if there is a  
21 significant chance that they would want to re-depose or re-  
22 open the depositions of our case in chief experts, it is  
23 appropriate that we know that decision, have that testimony  
24 scheduled and taken, and thereafter, depose the rebuttal  
25 expert, rather than what will inevitably be a seriatim re-

1 deposition of the rebuttal expert. Thank you.

2 MR. MOSKOWITZ: Your Honor, if I may respond  
3 because, unfortunately, there are just certain falsehoods in  
4 what Mr. Glatter just said.

5 He keeps talking about, this is a nuanced issue.  
6 There's not much nuance here. Mr. Coleman has a database  
7 where he keeps -- downloads things from the internet that he  
8 finds about terrorism. He used this database, as he said in  
9 his report, to find materials that he used to give his  
10 report.

11 When I read this, I called Mr. Glatter and his  
12 firm and I said, we're going to need to see this database  
13 because if he's relying on this and if he's going to testify  
14 that there is and is not information that he's forming his  
15 opinions on, including, well, I didn't find anything of this  
16 so I don't think anyone ever said anything like this, that's  
17 certainly going to be relevant to me and I'm going to need  
18 to know that.

19 Then over a period of time, it's set forth in  
20 letters, information sent to me saying, no, he did not  
21 search his entire database, he absolutely did not look in  
22 his other files, he just looked at his Hamas files. Then I  
23 sat down and I said, okay, but when I depose him, I don't  
24 want to find out something different because it's going to  
25 cause a huge problem.



1           We set it down for his deposition. I asked him  
2 and one of the first things he said to me was, oh, no, you  
3 can't just search part of my database, you have to search  
4 all of my database. And in doing so, he said, and because I  
5 searched my entire database, I know I didn't get any hits  
6 from PIJ, which is Palestinian Islamic Jihad, I know I  
7 didn't get any hits from Al Aksa (ph). And I said to him,  
8 well, how can I know that from the material you gave me? He  
9 goes, you can't. I said, so I just have to take your word  
10 for it? He goes, I guess so.

11           This is the exact issue which I highlighted to  
12 them was the exact concern I have. Now, the fact that after  
13 he read Mr. Jenkins's report and Mr. Jenkins pointed out  
14 that he never -- based on what he said, never did any work  
15 to consider if anyone else claimed responsibility for these  
16 attacks, Coleman, that he now -- Coleman went back after the  
17 fact and did a separate search is not the issue. I didn't  
18 ask for the materials that he looked at before after he his  
19 report, I wanted to know what he looked at for his opinion.

20           And that goes directly to the issue of postponing  
21 Mr. Jenkins's deposition. Mr. Jenkins wrote a rebuttal  
22 report to the opinions that Mr. Shakhed and Mr. Coleman  
23 offered in this case. That's what they wanted to depose him  
24 on. Now, instead, they're trying to use their failure to  
25 produce as a sword. What they're saying now is, even though

1 certainly none of Mr. Jenkins's opinions are informed by  
2 this information he's never seen and the manuscript he's  
3 never seen or a database he didn't have access to, they  
4 should be able to now put off his deposition, which  
5 conveniently coincides with another request they have to put  
6 off his deposition, so that they can then go forward and see  
7 if, based on what we find, which as Mr. Friedman said,  
8 largely goes to impeachment, or if there's other  
9 information, we might have to depose him again.

10           Even if we did feel the need to depose, for  
11 Dalbert reasons, these individuals again, it wouldn't change  
12 what Mr. Jenkins's opinion is. If, for some reason, after  
13 seeing all this, Mr. Jenkins feels the need to supplement  
14 his opinion, that's something else, but that's four steps  
15 removed and certainly nothing that should affect the fact  
16 that he's ready to be deposed next week on the opinion he  
17 offered in this case. And the fact that they failed to make  
18 adequate production of materials they should have produced  
19 before he gave his opinion certainly shouldn't enure to  
20 their benefit, so they can put off his deposition now.

21           THE COURT: Look, I don't want to hear anymore.  
22 I've heard enough.

23           Two terrabites is an incredible amount of data.  
24 You haven't provided any information on how that database is  
25 kept. Obviously, I don't think the defendant would object

1 to withholding any personal documents, passwords and  
2 contracts. You'll provide a list of documents that are  
3 really essentially personal documents, documents relating to  
4 -- that might be confidential work that he's performed for  
5 another client.

6 In many databases -- in most computers, you can  
7 search for documents by dates of accessing. Is that  
8 possible?

9 MR. GLATTER: Your Honor, the answer is, I don't  
10 know. We did provide the defendant with a substantive (ui)  
11 a sworn declaration by Mr. Coleman, describing in techno-  
12 language that I don't personally understand the protocols as  
13 to how material gets on the general database, and from  
14 there, how he created a sub-database of the specific  
15 materials that he relied upon to discover whether or not  
16 (ui) what he describes as authentic (ui) claims of  
17 responsibility, to whether or not those claims of  
18 responsibility are credible and reliable. And at his  
19 deposition, Mr. Coleman explained what he meant by credible  
20 and reliable.

21 Without burdening Your Honor with a subjective  
22 summary of the deposition, there was limited questioning as  
23 to sort of the overall protocols of how -- exactly how  
24 information gets in there and how the search -- how one goes  
25 about searching. The practical point is, once the request

1 came up, once it became clear that at least as to the  
2 rebuttal expert's report, that Mr. Coleman had done  
3 additional searching through his database to identify  
4 information (ui), if something had come back to him, he  
5 would have looked at it. I believe his testimony was that  
6 he didn't get any hits through these two other terrorist  
7 organizations' material.

8           That's when I proposed early on, to avoid the kind  
9 of issues that I was concerned about, that we adjourn the  
10 deposition, that we meet and confer further, and that we  
11 arrange for additional discovery of Mr. Coleman, which he  
12 was amenable to doing. Mr. Coleman is presently overseas, I  
13 believe in Bosnia. And, frankly, I would have to speak with  
14 him. I understand Your Honor's direction in terms of how  
15 material gets redacted, two terrabites of data, how it's  
16 indexed and whether or not he's able to easily identify what  
17 materials would be problematic and what the redaction  
18 protocols would be.

19           That's a subject for another discussion, probably  
20 one that we need to have some people with greater  
21 technological facility than me. But, again --

22           THE COURT: If there are documents that he never  
23 accessed, that he hasn't accessed in the last three years, I  
24 would think that there's absolutely no relevance to his  
25 opinion.

1 MR. GLATTER: Well, I think --

2 THE COURT: So I think you need to confer with him  
3 and perhaps -- just go forward with the deposition. The  
4 defendant can find out how that database is organized and  
5 then deal with the production subsequently. But to narrow  
6 it to what he conceivably may have looked at and not  
7 considered, because that happens, I'm sure.

8 MR. GLATTER: Once I get in touch with him -- Your  
9 Honor's point is if you think it's appropriate for Mr.  
10 Coleman to sit for further deposition so that the defendant  
11 has additional time to explore the sort of global universe  
12 of information that's within his database and how that  
13 thereafter relates to what he ultimately extracts out of it  
14 to review and reach the opinions he has, I'm sure we can  
15 reach that arrangement.

16 I think it's very important, though, for me to  
17 know that testimony, which I can't predict. I'm not the  
18 witness. Before I depose a rebuttal expert, because it's  
19 very important for me to know whether their rebuttal expert  
20 understands what Mr. Coleman has done, has not done, what he  
21 is opining, what he's not opining, what his methodology is  
22 and isn't --

23 THE COURT: Well, in the first instance, you have  
24 to produce those additional documents that he did look at.

25 MR. GLATTER: Yes, and we've represented -- yes,

1 and we --

2 THE COURT: You have to produce them now, so that  
3 to the extent that counsel is going to forward it to Mr.  
4 Jenkins, which I assume will be the case, then you can  
5 question Jenkins about it.

6 MR. GLATTER: Absolutely. Specifically in terms  
7 of materials that he -- what I'll call his files (ui)  
8 Islamic jihad and Al Aksa Martyrs Brigade, we made an  
9 affirmative representation on the record that Mr. Coleman  
10 would create a DVD of those specific files. He would  
11 extract them out of his general database and forward it to  
12 the defendants. I will get in touch with him and let him  
13 know that that needs to be done promptly.

14 MR. MOSKOWITZ: Your Honor, and if Mr. Jenkins,  
15 after receiving that material, supplements the expert report  
16 that he served on them months ago, then we will cross that  
17 bridge when we come to it. But as Mr. Luft said, they're  
18 now trying to use the fact that they did not produce what  
19 you're now telling them they need to produce, and the fact  
20 that Jenkins has not yet considered it as a basis to put off  
21 Jenkins's deposition for next week on the report that he  
22 served months ago and has been set for a long time and we  
23 have this window in Mr. Jenkins's travel schedule, where  
24 he's going to be deposed next week.

25 Your Honor should not allow them to put off Mr.

1 Jenkins's deposition for next week on the contingency that  
2 when they produce what they should have produced months ago,  
3 he may supplement his report based on that additional  
4 information. If that happens, we'll deal with it at that  
5 time. But to say that Mr. Jenkins's deposition on his  
6 report from months ago should be adjourned because they  
7 failed to produce something just has thing completely  
8 backwards.

9 MR. GLATTER: Your Honor, I'm prepared to, if Your  
10 Honor thinks it make sense, obviously to keep the deposition  
11 calendar for next week. The concerns that are driving this  
12 are what I've laid out in the last several minutes, the fact  
13 that we now have a service date for contention  
14 interrogatories and a response date for those contention  
15 interrogatories, which will, among other things, touch upon  
16 expert evidence presented by both sides.

17 I want to avoid the prospect of seriatim  
18 depositions and continually coming back for a need to reopen  
19 it, which has happened more than once in this case. I'm not  
20 casting any aspersions on why it's happened but it has  
21 happened, and recognizing that this is a situation that is  
22 fraught with that risk. I wanted to identify for Your Honor  
23 -- again, I think that it most likely makes sense to make  
24 sure that our case in chief experts that are being rebutted,  
25 that their testimony is fully captured. If Your Honor

1 thinks that it makes sense to continue the structure as it  
2 is, then obviously, we'll proceed.

3 THE COURT: Obviously, the defendant is at risk in  
4 having to produce a supplemental expert report by Jenkins  
5 and to produce him for a deposition. You're on a very tight  
6 schedule, I agree.

7 MR. FRIEDMAN: Right. The point is, Your Honor,  
8 that it's their production failure and this is the bed they  
9 made, and they should lie in it.

10 THE COURT: Look, it may or may not be quite as  
11 significant. I'm not prepared to say any more about that.  
12 Get the documents produced right away. See if he can  
13 produce documents that he accessed within a given time  
14 period. You can discuss what is an appropriate time period.

15 MR. GLATTER: Your Honor, I should say, he has  
16 produced all documents that he reviewed out of his database.  
17 In other words, if he runs a search for whatever the search  
18 parameters are -- and they -- we certainly invited them to  
19 ask him, what searches did you run? I don't believe those  
20 questions -- what were the specific searches that you ran.  
21 I don't believe that was asked. He didn't state it.

22 THE COURT: Well, taking your analogy, like West  
23 Law, you get a lot of hits.

24 MR. GLATTER: Right.

25 THE COURT: And probably 50% of the cases you



1 find, you discard. But you may wade through them a little  
2 bit before deciding to discard. So those documents that you  
3 don't want to consider may or may not be relevant.

4 MR. GLATTER: And I should add, we've already  
5 produced what I've described as a sub-database. That  
6 database included all the documents that were provided and  
7 appended to his report, all the documents that are in what  
8 he describes as his Hamas file, in terms of his database's  
9 protocol, which include a much larger universe of material  
10 concerning Hamas in various ways that don't -- that he  
11 didn't actually consider or rely upon with respect to his  
12 opinions on the 18 specific attacks that his report related  
13 to.

14 So already, we actually did produce, in accordance  
15 with the kind of scenario that Your Honor just described.  
16 What we're talking about here is if, again, the question is  
17 whether or not typing in the search terms -- that runs back  
18 also hits for an attack issued in a file that -- it may be  
19 in a file that he has for the Al Aksa Martyrs Brigade, for  
20 PIJ, for Al Qaeda, for the Fark (ph) in Colombia. That's a  
21 different issue. That wasn't what he was asked to do.

22 And that fundamentally drove -- why I don't want  
23 to characterize this as a production failure on our part --  
24 why we explained to them originally why Mr. Coleman was not  
25 prepared to turn over a physical copy of his entire

1 database, as opposed to already having gone to considerable  
2 effort to provide these sub-database materials and is  
3 actually much larger than what he's considered, relied on or  
4 physically looked at, in terms of arriving at his opinions.

5 MR. FRIEDMAN: Your Honor, I just think we've had  
6 more than enough and I just want clarity as to the documents  
7 that they are going to produce because -- and I want to be  
8 clear. He produced to us a file which had his Hamas  
9 material. My concern has always been that if you take off  
10 the blinders and don't look just at Hamas, that there are  
11 other things. And this is what he told me at his  
12 deposition, that in fact, whatever other material he had on  
13 other terrorist groups, those are the searches that I would  
14 like to know.

15 I would like to know -- there are 15 attacks in  
16 question. We certainly have a question -- there's a  
17 question before this Court of who committed those attacks.  
18 If there's any material in this database that he would have  
19 looked at which would have related to who committed these 15  
20 attacks, it's relevant.

21 Moreover, Your Honor, I don't believe Mr. Coleman  
22 is a qualified expert, for reasons we set forth in our --  
23 I'm not going to get into that. But the point is, the basis  
24 that he sets himself forth as an expert for the most part is  
25 the quality of this database and the materials that he has.

1 That is what he cites as the reason that he has expertise.  
2 Certainly we should be able to know what's in there.

3 THE COURT: As I suggested, he'll obviously  
4 produce promptly the data that he claims he did look at.  
5 And what I would suggest as a guide is to just include with  
6 those documents any documents he accessed in that same time  
7 period.

8 MR. GLATTER: I guess part of the confusion is  
9 access.

10 THE COURT: Well, I think most computers can do  
11 that for you. They can sort out the files. In fact, that's  
12 one of my --

13 MR. GLATTER: My understand is -- and, again, I  
14 would just ask Your Honor's permission to at least confer  
15 with the witness and the requisite technical people. My  
16 understanding is it's not so simple as -- it's not like West  
17 Law, where you say, I'm going to limit my search to all feds  
18 and put a restriction (ui).

19 THE COURT: Well, I assume this is a fairly recent  
20 review by him.

21 MR. GLATTER: The review -- there were two  
22 reviews, as I understand it. One was the review he did  
23 looking for authentic -- what he describes as authentic  
24 Hamas claims of responsibility, which he conducted that  
25 review before he issued his report in I guess it was July.

1 It's clear that at that time, he did not conduct a review  
2 for authentic PIJ claims of responsibility, authentic Al  
3 Aksa Martyrs Brigade claims of responsibility.

4 If the defendant believes that his decision not to  
5 do so and the search protocols that he did somehow impact  
6 the reliability of his methodology, then that's an argument  
7 that they can make. It's one that is somewhat indicated in  
8 their rebuttal expert's report.

9 But he didn't do -- it was only when Mr. Jenkins  
10 issued a report that commented about what he described as  
11 potentially competing claims of certain attacks, that at  
12 that time, Mr. Coleman then ran a search, put in restrictors  
13 that would have at that point allowed his database to pop up  
14 -- obtain hits, had there been any, for authentic claims of  
15 responsibility from the Al Aksa Martyrs Brigade and PIJ for  
16 particular attacks, Mr. Coleman testified he didn't get any  
17 hits back. So what he did is he ran a search through the  
18 database that would have identified if those organizations'  
19 web sites had come back with hits to him. He didn't find  
20 anything and he testified as such on the record.

21 That's a different issue, in other words, than  
22 turning over two terrabites of data that include all the  
23 information on Al Qaeda --

24 THE COURT: I'm not going to require the full  
25 database --

1 MR. GLATTER: I'm sorry?

2 THE COURT: I'm not requiring the full database to  
3 be turned over.

4 MR. GLATTER: Thank you, Your Honor.

5 THE COURT: I'm proposing -- and I think it is  
6 possible. You pick a date, whether it's from the date of  
7 the first report or from Jenkins's report, and see if you  
8 can fish out all the documents that he accessed in the  
9 database, carving out whatever truly proprietary and private  
10 documents, or you make another proposal as to how to get to  
11 the documents.

12 MR. MOSKOWITZ: Relating to his opinions and  
13 representations in this case.

14 MR. FRIEDMAN: But, Your Honor, that begs the  
15 question. The man has a database, he runs a search through  
16 the database. Several of the attacks, as Mr. Shakhed  
17 concedes, competing terrorist groups made competing claims  
18 of responsibility for several of the attacks here. We're  
19 entitled to know what it is in Mr. Coleman's database  
20 relating to that.

21 Every time Your Honor rules, Mr. Glatter pipes up  
22 and says but this, but this, but this. We're entitled to  
23 know what is in his database relating to the groups that are  
24 at issue here, and it's not just Hamas. We don't want data  
25 about Colombian terrorists, we don't want data about Bosnian

1 terrorists.

2           We should try to talk this through, but Mr.  
3 Glatte keeps trying to slip words to Your Honor, to get  
4 Your Honor's agreement, to suggest that we're only entitled  
5 to see the parts of the database that Mr. Coleman relied  
6 upon, and I think Your Honor has made clear that the  
7 standard is not what he relied upon, it's what he accessed.  
8 And, therefore, we're entitled to the parts of the database  
9 that are relevant to the analysis he purported to do with  
10 respect to the 15 attacks at issue here.

11           And that is not, not limited to what he actually  
12 relied upon because, Mr. Glatte, if it were, you would not  
13 be agreeing to produce anything more, and you are agreeing  
14 to produce something more. It's what he accessed that is  
15 relevant to the analysis that he did here.

16           MR. GLATTE: I don't want to beat what is  
17 probably now a very dead and tired horse on the subject.  
18 Probably what makes the most sense is, I think defense  
19 counsel and plaintiffs' counsel should sit and confront  
20 exactly what the universe of material is that is appropriate  
21 to produce, and then we can confirm with Mr. Coleman, among  
22 others, to find out from a technological standpoint the  
23 turnaround time to extract and produce it to them, because  
24 clearly Your Honor agrees.

25           The only request that was on the table and why

1 I've had to raise this has been, have him produce a physical  
2 copy of the entire two terrabites of data. Presumably,  
3 they're willing to discuss redaction in some sense of the  
4 material that's within there. I don't know how one does  
5 that. And in light of the fact that that was the proposal,  
6 that was the request that was made, and for the reasons I've  
7 explained today and Mr. Coleman's own reasons, we didn't  
8 believe we were in a position to literally turn over several  
9 DVD's that constitute the entire database, I presented the  
10 issue today.

11           There is a -- what we have represented on the  
12 record is, whatever the files are that Mr. Coleman would  
13 have targeted with respect to his review of materials issues  
14 in Mr. Jenkins's report, even though he didn't get back any  
15 hits, we'll turn it over. They will basically have his PIJ  
16 and his Al Aksa Martyrs Brigade files.

17           There may be some larger universe of material that  
18 Your Honor believes is appropriate for the defendant to have  
19 access to, to review, to have their rebuttal expert review,  
20 to see whether or not it supports or perhaps detracts from  
21 the current opinions that he's offering. And it probably  
22 makes sense for us to have a discussion about that, to see  
23 if we can agree on those parameters.

24           Unfortunately, like I said, the only request that  
25 was on the table was for physical production of the whole

1 thing, and that's problematic. Your Honor recognizes that,  
2 and I think I do -- I think with all due respect, Mr.  
3 Coleman deserves to be consulted on this, so at least he has  
4 an idea and can give an honest representation as to what the  
5 turnaround time would be for that, because it's his  
6 database, it's his proprietary search engine that extracts  
7 material out of it. I don't even know how to spell it, let  
8 alone how it works, so that's a discussion that needs to be  
9 had, and he's in Bosnia right now.

10 MR. FRIEDMAN: We'll discuss that with plaintiffs,  
11 Your Honor, although it's their expert and --

12 THE COURT: Well, I have to say, to the extent  
13 that your expert will be able to utilize their expert's  
14 database to beef up his opinion, I am a little concerned  
15 because, you know --

16 MR. FRIEDMAN: He's not going to do that, Your  
17 Honor.

18 THE COURT: That's right. The real question is,  
19 what Mr. Coleman accessed.

20 MR. FRIEDMAN: Exactly.

21 THE COURT: I think it's possible. The problem is  
22 that -- my main concern is that the data that's stored on  
23 the computer will only show the last date that information  
24 was accessed and not necessarily -- if information was  
25 accessed more recently, we don't know whether or not it was



1 accessed in July or August. But you'll discuss what's  
2 technologically feasible and what's a good way to get the  
3 information that would give you some sense of what Mr.  
4 Coleman did look at.

5 MR. FRIEDMAN: And if Mr. Jenkins thereafter  
6 supplements his report and looks at this and feels it's  
7 necessary to supplement his report and there has to be  
8 another deposition, we'll deal with that. To pick up Mr.  
9 Osen's theme earlier with respect to Mr. Shakhed, maybe by  
10 then, we'll be into the NatWest expert discovery. But,  
11 again, we'll go forward with Mr. Jenkins's deposition next  
12 week. We'll consult with them about what the possibilities  
13 are to define what we need and what we're entitled to from  
14 Mr. Coleman's database. And if we can't reach an agreement  
15 on that, we will try to set up a call with Your Honor.

16 On one last point in the Credit Lyonnais cases, so  
17 that I don't need to run back to Your Honor right away  
18 necessarily, again, as I noted in my letter yesterday, we've  
19 written five letters to plaintiffs about documents we need  
20 from their experts. The only objection we've gotten so far  
21 is -- concerns Mr. Shakhed's manuscript, on which Your Honor  
22 has now ruled.

23 Mr. Bonner's firm gave us all the documents we  
24 asked for with respect to Mr. Naim, but we have four letters  
25 outstanding, dating back to October 27, relating to Mr.

1 Berjeras (ph), Ms. McCloud (ph), Mr. Shakhed as well. The  
2 fourth witness -- the subject of the letter -- Mr. Gross as  
3 well.

4 Again, I don't need a date from Mr. Glatter today  
5 but, again, these letters date back to October 27 and I  
6 would like responses, either with objections that I can  
7 bring to Your Honor or with the documents themselves. We've  
8 got to get moving. Again, I don't want to sound like a  
9 plaintiff, I'm a defendant, but we've got to get moving.

10 MR. BONNER: My only response, Your Honor, is that  
11 they vary in degree of complexity. Mr. Friedman is entirely  
12 correct that you're entitled to answers. And as soon as we  
13 hear back from all precincts, we will do so as quickly as  
14 possible.

15 THE COURT: I don't quite appreciate what you're  
16 saying.

17 MR. BONNER: Well, for example, Your Honor, some  
18 things are not necessarily in the possession of the expert,  
19 but they've made inquiries as to whether they can obtain a  
20 copy of a record.

21 THE COURT: All right.

22 MR. BONNER: So we're just trying to put our  
23 answers in as completely and as fast as we can. He correct  
24 that he's entitled to responses. We're just trying to put  
25 it all together.

1 THE COURT: Well, could I ask you perhaps to come  
2 up with objections sooner?

3 MR. BONNER: Absolutely.

4 THE COURT: That way, to the extent that there are  
5 any disputes, they can be framed fairly quickly and  
6 addressed.

7 MR. BONNER: To sort of put a little disclaimer  
8 in, since there are different lawyers working on each one of  
9 them, I don't want to presume to represent as to the total  
10 universe. But my best understanding is that for the most  
11 part, they're not objections. I will try and identify from  
12 my co-counsel whether there are any specific issues. We'll  
13 raise them Mr. Friedman. For the rest, it's a logistical  
14 question.

15 THE COURT: Okay. So you'll raise it -- you'll  
16 discuss objections that you may have to the requests within  
17 -- today is the 9<sup>th</sup>, so by the 23<sup>rd</sup>. That gives you two  
18 weeks.

19 MR. BONNER: Yes, absolutely, Judge.

20 THE COURT: Okay.

21 MR. FRIEDMAN: Finally, Your Honor, I have here  
22 the new scheduling order, proposed scheduling order, to  
23 which the parties have agreed --

24 THE COURT: Okay.

25 MR. FRIEDMAN: -- in the NatWest cases --

1 THE COURT: Okay.

2 MR. FRIEDMAN: -- which I can hand up or Mr.  
3 Schlanger can hand up. And this is the schedule to which  
4 the parties have agreed for the completion of all discovery  
5 in the NatWest cases. Fact discovery is done. We're going  
6 to exchange the first round of expert reports at the end of  
7 this month. Again, this is on the understanding -- my  
8 understanding from Mr. Schlanger as confirmed this morning,  
9 that we're not going to get the thousands of pages of  
10 foreign language documents that we haven't seen before, so  
11 that we can move rapidly to rebuttal reports and  
12 depositions. The schedule should be workable.

13 THE COURT: I don't know how many of these orders  
14 I've signed.

15 MR. GLATTER: It's always good to be optimistic,  
16 Your Honor.

17 THE COURT: Okay. I see an end date, so I'm  
18 happy.

19 MR. FRIEDMAN: Thank you, Your Honor.

20 THE COURT: Anything else?

21 MR. FRIEDMAN: We wish the Court a good holiday.

22 THE COURT: Yes. Just to have some sort of  
23 control date, once you get the responses to the RFA's and  
24 the contention interrogatories, which was now set for March  
25 28<sup>th</sup>, the next step, I would assume, would be the pre-motion

1 letters.

2 MR. FRIEDMAN: Right. I think perhaps --

3 THE COURT: Does it makes sense to set the date  
4 now or do you want to propose -- send me a letter regarding  
5 the dates within a week or so after you get the responses?

6 MR. FRIEDMAN: I think the parties will agree on  
7 dates for exchanging pre-motion letters after March 28<sup>th</sup>.

8 MR. GLATTER: Yes.

9 THE COURT: Okay. Let me just put a date so we  
10 can subtract --

11 MR. FRIEDMAN: She we have -- if Your Honor does  
12 not mind, should we set a date for a telephone conference  
13 promptly after March 28<sup>th</sup>, so we can tell Your Honor exactly  
14 what we propose to do?

15 THE COURT: That's fine. That may be easier.

16 MR. FRIEDMAN: So anytime the week of April 4<sup>th</sup>?

17 THE COURT: April 4<sup>th</sup>. Okay.

18 MR. GLATTER: Right now, that looks fine.

19 THE COURT: Okay, let me call up. I forgot to  
20 bring my calendar.

21 MR. GLATTER: I'm just checking our calendar  
22 for --

23 (Pause in Proceedings)

24 THE COURT: The 6<sup>th</sup>?

25 MR. FRIEDMAN: That's okay.

1 MR. GLATTER: The 6<sup>th</sup> is fine, Your Honor.

2 THE COURT: You pick a time.

3 MR. GLATTER: If it's going to be a telephone  
4 conference, I'm pretty flexible. Should we keep it at  
5 11:00?

6 THE COURT: Well, if you're flexible, let's have  
7 it a little earlier. I like to get --

8 MR. GLATTER: 9:30, Your Honor, 10:00?

9 THE COURT: 9:30? Good.

10 MR. FRIEDMAN: Thank you, Your Honor.

11 MR. GLATTER: Thank you, Your Honor. Have a good  
12 holiday.

13 THE COURT: You, too. And then at the next  
14 conference, we'll discuss our next date for the Weiss cases.

15 MR. FRIEDMAN: Thank you, Your Honor.

16 MR. GLATTER: Thank you, Your Honor.

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18 I certify that the foregoing is a correct transcript  
19 from the electronic sound recording of the proceedings in  
20 the above-entitled matter.  
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25 ELIZABETH BARRON

December 13, 2010